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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PERCY DAVIS AS AMICUS CURIAE

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BRIEF OF PONCET DAVIS AS AMICUS CURIAE

With the consent of the parties, Poncet Davis files this brief as Amicus Curiae. The original copies of the consents of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

Amicus Curiae, Poncet Davis, has an interest in this case in that he has now pending in the Court of Appeals for the Sixth Circuit an appeal from a decision of the United States District Court for the Northern District of Ohio, *Poncet Davis* v. *United*

States, Criminal No. 20,632, in which the question involved is the same as that presented in the instant case.

Amicus Curiae was convicted of four counts of willfully attempting to defeat and evade payment of his income taxes by filing false and fraudulent income tax returns. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently, and fined $10,000 on each count, making a total sentence of five years of imprisonment and $40,000. The conviction was affirmed on appeal, 226 F. 2d 331, and certiorari was denied 350 U.S. 965. Thereafter, the District Court reduced Amicus' sentence from five to four years on each count, the sentences to run concurrently.

After commencement of service of sentence, Amicus Curiae filed a motion to correct his sentence under 28 United States Code, Section 2255, in the United States District Court in which he had been tried, contending that the crimes for which he had been convicted were, under law, misdemeanors rather than felonies, and that the maximum penalty prescribed for such misdemeanors was imprisonment for the period not exceeding one year and a fine not exceeding $1,000. The motion was overruled by the United States District Court for the Northern District of Ohio on September 27, 1956. (Appendix A, *infra*).

Amicus Curiae took an appeal from that decision to the United States Court of Appeals for the Sixth Circuit and filed his brief in that Court on December 17, 1956. The Government has been granted until February 14, 1957 to submit its brief. Counsel have been advised by the Clerk of the Sixth Circuit that on the

present state of the calendar in that Court, Amicus Curiae's case will not be reached for argument before April, 1957, at the earliest.

Since the question presented in the instant case is identical to the question presented in the appeal of Amicus Curiae to the Sixth Circuit, the decision in this case will, for all practical purposes, be dispositive of Amicus' appeal.

REASONS FOR GRANTING THE WRIT

1. The instant case squarely presents the issue expressly left open by this Court in its decision in *Berra* v. *United States*, 351 U.S. 131.

The indictment in that case, as in this case, charged the income tax evasion by filing false and fraudulent returns in claimed violation of Section 145(b) of the Internal Revenue Code of 1939 (26 U. S. C. 145(b)). Berra was convicted and sentenced to four years in prison on each of three counts, the sentences to run concurrently, the sentences being within the maximum authorized by Section 145(b).

At the trial, Berra's request for a special instruction to the jury that it might find him guilty of the lesser crime defined in Section 3616(a) of the Internal Revenue Code of 1939 (26 U.S.C. 3616(a)) was denied and that denial was assigned as error on appeal. The Court of Appeals for the Eighth Circuit affirmed, 221 F. 2d 590.

This Court's grant of certiorari in the *Berra* case was "limited to the question of whether it was error for the trial judge to refuse to give the requested instruction." 351 U.S. at 133. The opinion of the Court, by Justice Harlan, narrowed the focus of con-

sideration to the single issue presented by the limited grant of certiorari and concluded that it was not within the province of the jury to determine which of the two provisions of law should apply. "[T]here is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 135; and the trial judge's refusal to grant the requested instruction was upheld. The Court expressly emphasized the extremely narrow compass of the case, concluding:

> "The *only* question before us is *whether the jury should have been allowed to decide* whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction." 351 U.S. at 135. (Emphasis supplied.)

Justices Black and Douglas dissented. In their view, Berra's failure expressly to challenge the validity of the sentence and conviction before the District Court and the Court of Appeals was no obstacle to a complete determination of the matter by this Court.[1]

The majority opinion in the *Berra* case makes it plain that questions "as to the validity of petitioner's

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[1] Justice Black, in dissent, wrote:

> "In my judgment the requested instruction was adequate to call the trial judge's attention to petitioner's contention that the offense charged was not a felony but a misdemeanor. But even if the question should have been raised again when the judge announced the sentence 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' * * * I think we should correct the plain error of the trial judge in sentencing petitioner under the felony statute." 351 U.S. at 137-138.

conviction and sentence" "might have been raised," but were not properly raised by requesting an instruction to the jury. As "questions of law for the court," it was—according to the majority—appropriate to raise them by way of challenge to the validity of the conviction and sentence. By Petitioner's motion in this case under 28 U.S.C. Sec. 2255 and Rule 35, Fed. Rules of Crim. Proc., the questions reserved by this Court in *Berra* were specifically and properly presented in the courts below, and are now properly before this Court.

2. As the Government has noted in its Memorandum filed in this case (at p. 4), the question left open by this Court in *Berra*, and raised by Petitioner, has been raised in many proceedings in the lower courts.[2] Moreover, it can arise in any case involving a prosecution under Section 145(b) of the 1939 Code where the charge is based upon the filing of false and fraudulent returns. As the Government has observed, in "almost every case prosecuted under Section 145(b), the proof * * * is identical with that required to prove * * * violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap." (Mem. for U.S., p. 2). In short, until the question presented by this case is definitely resolved by this Court, a cloud of doubt will remain as to the applicable penalty provision in almost every income tax evasion case.

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[2] In addition to Amicus' case, see, e.g., *United States* v. *Nicastro* (EDNY 1956), 143 F. Supp. 756; *United States* v. *Cincotta* (NDNY, Crim. 31842) not yet reported.

In a number of cases where the issue was raised, it was not done so by challenge to the validity of the sentence in the trial court. See, e.g., *Doyle* v. *United States* (CA 7) 234 F. 2d 788, cert. den. 352 U.S. 893; *Achilli* v. *United States* (CA 7) 234 F. 2d 797, cert. den. 352 U.S. 916; *United States* v. *Moran* (CA 2) 236 F. 2d 361, cert. den. 352 U.S. 909.

The overlap between Sections 145(b) and 3616(a) was eliminated by the enactment of the Revenue Code of 1954[3] and the problem posed by this and other cases prosecuted under the 1939 Code will not arise in prosecutions under the 1954 Code. In the meantime, however, prosecutions under the 1939 Code continue and there are many defendants in Federal institutions today serving sentences imposed upon them for violation of the 1939 Code—sentences based on the assumption that the penalty is that provided by Section 145(b) rather than by Section 3616(a). It is particularly important therefore that any doubts concerning the applicable penalty in these cases be decided *now*. For in the event that it is ultimately determined that the penalty applicable in these matters is that provided by Section 3616(a) rather than 145(b), it will be small consolation for those defendants who will have already served all or significant portions of lengthy terms of imprisonment.[4]

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[3] Section 7207 of the Internal Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade" as was true under Section 3616(a). It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b).

The changes between former Section 3616(a) and present Section 7207 are graphically illustrated in the following ramseyred version:

~~Whenever~~ Any person who willfully delivers or discloses to the ~~collector or deputy~~ *Secretary or his delegate* any list, return, account, or statement, *or other document,* ~~with intent to defeat or evade the valuation, enumeration, or assessment intended to be made~~ *known by him to be fraudulent or to be false as to any material matter,* ~~he~~ shall be fined not ~~more than~~ *exceeding* $1,000, or be imprisoned not ~~exceeding~~ *more than* one year, or both. ~~at the discretion of the court, with costs of prosecution.~~

[4] Prison sentences in 145(b) prosecutions have become substantial in recent years. Petitioner's term was set at five years;

3. The question presented in this case not only is timely and of widespread effect, but is also important because it touches upon a principle fundamental to our system of criminal justice. The Government has conceded that Sections 145(b) and 3616(a) overlap and that in almost every instance the proof to make out violation of one is identical to the proof required to convict under the other (Memo of U.S., p. 2). The necessary consequence is that in all such cases a situation is presented where two different and distinct penalties are applicable and Congress, to which the Constitution has reserved the function of declaring criminal penalties, *United States* v. *Hudson and Goodwin,* 7 Cranch (U.S.) 32; *United States* v. *Britton,* 108 U.S. 199; *United States* v. *Eaton,* 144 U.S. 677, *Viereck* v. *United States,* 318 U.S. 236, 241, 243-4, and hence of providing a standard, has failed to provide any clear criterion for choosing between them.

It is clear that no guidance can be obtained by referring to the indictment. This Court long ago declared: "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force . . . . We must look to the indictment itself, . . . although the representative of the United States may have supposed that the offence charged was covered by a different statute." *Williams* v. *United States,* 168 U.S. 382, at 389. See also *United States* v. *Hutcheson,* 312 U.S. 219, 229; *Rosenberg* v.

Amicus' term at five years, subsequently reduced to four years; Berra's term originally set at four years. See also, e.g. *Gariepy* v. *United States* (CA 6) 220 F. 2d 252, cert. den. 350 U.S. 825 (4 years); *Heasley* v. *United States* (CA 8) 218 F. 2d 86, cert. den. 350 U.S. 882 (3 years); *Bardin* v. *United States* (CA 7) 224 F. 2d 255, cert. den. 350 U.S. 883 (4 years).

United States, 346 U.S. 273, 306 (Opinion of Frankfurter, J.).

There are two possible answers to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *first*, that no conviction under either provision is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation; and *second*, that if the two provisions may co-exist, then only the less harsh of the two may be applied in this case.

It has been long settled that a criminal statute can be void for vagueness as much where the punishment to be inflicted is uncertain or open to speculation as where the acts prohibited are ambiguously or poorly defined. See *Holmes* v. *United States*, 267 F. 529, 531 (CA 5, 1920) cert. den. 254 U.S. 640; *Smith* v. *United States*, 145 F. 2d 643, 644-5 (CA 10, 1944) cert. den. 323 U.S. 803. "And a statute which . . . leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative." *Smith* v. *United States*, 145 F. 2d at 645.

This fundamental principle was unanimously applied by this Court in *United States* v. *Evans*, 333 U.S. 483. There the defendant was charged with concealing and harboring aliens in violation of Section 8 of the Immigration Act of 1917. Confusion existed as to the penalties applicable to the offenses charged in the indictment. The District Court granted a motion to dismiss the indictment and the Government appealed directly to this Court. Justice Rutledge, writing for a unanimous court, stated the problem of the case as follows:

"The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses . . . The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting . . . inconsistent answers on the statute's wording." 333 U.S. at 484-5.

The opinion then sets out the alternative contentions:

"the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty." 333 U.S. at 485.

"Appellee . . . denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion * * * that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all." 333 U.S. at 485-6.

The Court noted the extreme nature of the appellee's argument, remarking: "where Congress has exhibited clearly the purpose to proscribe conduct * * * and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." (333 U.S. at 486). But the Court also observed:

> "But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree." 333 U.S. at 486-7.

After discussing the alternative punishments, this Court concluded:

> "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the

> several possible constructions Congress thought to apply . . .
>
> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. at 495.

The rule enunciated and applied by this Court in the *Evans* case appears applicable to the situation posed by this case. As in *Evans*, more than one penalty can imposed here and it is not possible "either from the [statute's] wording or from the legislative history, to ascertain with any fair degree of assurance which one of the penal consequences Congress may have had in mind." Thus, one solution to the problem posed in this case might be to apply the reasoning in *Evans*, and hold any conviction for income tax evasion based upon the filing of false and fraudulent returns under 145(b) or 3616(a) to be void, in view of the fatal ambiguity relating to penalty inherent in these statutes.

The second alternative might be to apply the less harsh of the two penalties in any case in which the two provisions apply.

The rule that only the less harsh of two applicable penalties can be imposed is no more than an application of the well accepted principle that where there is ambiguity in the construction of penal statutes, doubts will be resolved in favor of the accused. Only recently, this Court applied this principle in *Bell* v. *United States*, 349 U.S. 81, where the issue was whether the Mann Act made the simultaneous transportation of

more than one woman liable to cumulative punishment for each woman so transported.

In answering the question, this Court observed:

> "It is not to be denied that argumentative skill * * * could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it * * *. *When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.*" 349 U.S. at 83 (emphasis supplied.)

The philosophy underlying the principle was also pungently described:

> "And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.*" *Ibid.* (Emphasis supplied.)

The *Bell* case only reiterated what this Court has often said before, and in other contexts. See, e.g., *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10; see also *Wallis* v. *Tecchio*, 65 F. 2d 250, 252 (CA 5, 1933). And the rule is so well established that it was accepted in the *Evans* case as a basic axiom:

> "The argument is therefore *not merely that a rule of strict construction should be applied in petitioner's favor.* It is rather that the choice the Government asks us to make is so broad and so deep . . . that we have no business to make it at all." 333 U. S. at 486. (Emphasis supplied.)

The problem presented by the instant case is manifestly not as simple nor as one-sided as the Government suggests (Mem. of U.S., p. 3). It runs far deeper than the single question of whether there has been a repeal by implication. Moreover, the view for which the Government contends necessarily results in placing in the hands of the prosecuting officer the power to select between the two different applicable penalties in any given case; and this is a power which flies in the face of a basic tenet of our system of criminal justice that all persons must be treated equally under law. See *Berra* v. *United States,* 351 U.S. at 140 (Black, J., dissenting); *Rosenberg* v. *United States,* 346 U.S. at 306 (Frankfurter, J.); *Bell* v. *United States,* 349 U.S. at 83; *United States* v. *Evans,* 333 U.S. at 495.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cr. No. 20632

UNITED STATES OF AMERICA

v.

PONCET DAVIS.

McNamee, District Judge.

The brief of the Government in opposition to defendant's motion to correct sentence refutes effectively and completely the arguments advanced in support of the motion and demonstrates convincingly that the sentence imposed was in all respects legal. For these reasons I adopt the Government's brief in toto and incorporate it in this opinion. I would add only the following: It is a firmly established rule of statutory construction that where an Act contains special provisions, they are to be considered as exceptions to a general provision in a separate earlier or later enactment. 50 *Am. Jur.* Sec. 367, p. 371; id. Sec. 561, p. 562. The general principle is stated in 82 *C.J.S.* Sec. 369, p. 843, thus:

> "It is a fundamental rule that where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment."

Section 3616(a) is a general statute embracing many types of false documents and relating to all classes of taxes. Section 145(b) defines as a felony a willful attempt "in any manner to evade or defeat any tax imposed *by this Chapter*," etc. (Emph. sup.) Section 145(b) is in

the chapter that deals specifically and solely with Income Tax and should be considered and treated as an exception to Sec. 3616(a). See *Robinson* v. *United States*, 142 F. (2d) 431, and cases therein cited. Compare *United States* v. *Tiplitz*, 105 F. Supp. 512. I am not unmindful of the apparent conflict of the above with *United States* v. *Gilliland*, 312 U.S. 86; but in view of the legislative history of Section 145(b) I am of the opinion that the principle hereinabove referred to is applicable.

The motion is overruled.

/s/ CHARLES J. McNAMEE
United States District Judge

Sept. 27, 1956